It is therefore very similar to an ordinary mortgage where the mortgagor remains in possession. *Harrold v. Plenty* (1901) 2 Ch., 314.

Unless there is a covenant in the mortgage to the contrary, the mortgagor takes the crops grown on the mortgaged land.

If the mortgagor of land can take the produce of the land, why can the mortgagor of cattle not take the produce of the cattle? It has not been suggested that he could not take the milk of the buffaloes although they have been assigned—why can he not take this young?

The bill is given as a security that the lender will be repaid his loan of $475 with interest at 12% per annum. When the borrower repays the principal and agreed interest, he is entitled to a discharge of the Bill of Sale. He redeems his animals. This does not mean that he redeems the young born of the mortgaged animals because the young are not included in the bill of sale: they have not been mortgaged.

If the lender is entitled to retain the young as well as to have his principal repaid with interest, he gets more than he contracted for.

The provisions regarding security bills of sale are intended for the protection of the grantor; *Manchester Sheffield & Lincolnshire Rly. Co. v. North Central Wagon Company,* 13 A.C. at 560, and it appears to me that to give to the grantee of the bill more than he has contracted for is to construe a highly technical document too liberally in his favour.

In my opinion the after-born calves never were the property of the grantee Santa Singh. They were the property of Budha. If he sold them he would commit no criminal offence.

The three calves born after the date of the bill of sale were properly attached and I would allow this appeal with costs of the appeal only.

Gordon-Smith, Ag. J.A.—I have had the advantage of seeing the Judgment of Poyser, C.J. in this appeal.

I agree that, except as to costs, the point, and the only point before us, was to the effect as to whether the subsequent progeny of certain buffaloes which had been specifically described in a Bill of Sale, were included in such Bill of Sale and so passed to the Grantee. It is quite impossible under such circumstances to include a description of such progeny in the Bill of Sale and, having regard to the meticulous requirements of the Statutory form of a bill of sale, a departure from which renders the same void, it is therefore equally impossible to hold that such progeny (or after acquired property) is or can be included in a Bill of Sale and, at the same time, conform with those Statutory requirements.

For these and the reasons given by Poyser C.J., I would make the order proposed by him.

Appeal allowed in part.

[APPELLATE CIVIL JURISDICTION]

CUSSEN, J.

September 9, 1939.

CHAN CHOU HAR

v.

CHAN PHOOI HOONG (No. 1).

[SELANGOR CIVIL SUIT No. 100 of 1939]

Civil Procedure Code, Ss. 212, 213, 460 (i)—summary procedure—application for leave to defend—supporting affidavit by defendant—notice to cross-examine deponent—non-compliance with notice—rejection of affidavit—order giving conditional leave to defend—order set aside.

The defendant applied for leave to defend the Suit, and his application was supported by an affidavit. The plaintiff's solicitor gave notice to the defendant to attend for cross-examination on his affidavit. The defendant did not appear, but he was represented by Counsel at the hearing before the Registrar of his application for leave to defend. The Registrar held that the affidavit could not read but made an order giving leave to defend on payment into Court of the sum of $5,000/-.

On appeal to the Court of a Judge—

Held, that the Registrar was wrong in rejecting the affidavit and that the plaintiff should have asked the Registrar to make an order for attendance of the defendant and then, the Registrar should consider and decide whether to make an order or not.

Re Krishnasamy, (1933-34) F.M.S.L.R. 8; 2 M.L.J. 195 doubted.

APPEAL from the decision and order of the Registrar dated the 3rd August 1939, refusing to read an affidavit by the defendant in support of his application for leave to defend the Suit on the ground that the defendant failed to comply with a notice to produce the defendant for cross-examination on his affidavit.

Teh for defendant—appellant:—Order 14, r.3 (c) provides for cross-examination of a defendant in Summary Procedure in England. There is no such provision in our Code with regard to Summary Procedure. 0.38, r.28 enables a party by notice to require

a deponent to be produced for cross-examination upon his affidavit, but it relates only to "Trials on Affidavit". There is no similar provision anywhere in our Code *re Krishnasamy,* (1933-1934) F.M.S.L.R. 8; 2 M.L.J. 195 An order of Court is necessary under our Section 213. *Re Krishnasamy* is based on English law, if good law, does not apply. It was over-ruled on appeal, by consent. S. 213 does not apply to applications for leave in Summary procedure. Section 213 corresponds with 0.38, r.1. See note thereto in Yearly Practice headed "To what Rule applies." *Abrahams v. Dunlop Pneumatic Co.* (1905) 1 K.B. 46, 52. The object of cross-examination of defendant is to challenge alleged facts. Facts are for the Judge to decide at the trial. The Registrar cannot order the attendance of defendant, because the truth of the alleged facts are not relevant to him. His power is limited to seeing whether affidavit discloses a defence. Defendant's affidavit alleges fraud. This is an allegation on which he is entitled to unconditional leave to defend. The Registrar cannot enquire into the merits of the allegation.

Millard v. Baddeley, (1884) W. N. 96.

Fuller & Co. v. Alexander Bros., (1882), 52 L.J., Q.B., 103.

Jacobs v. Booth's Distillery Co., (1901), 85 L.T., 262.

Yorkshire Banking Co. v. Beatson, (1879), 4 C.P.D. 213. Our (1932) R. 1, s.r. 24 provides the ordinary procedure. The Registrar has made no order for cross-examination of defendant. There is no affidavit in reply, nor any reason to doubt defendant's *bona fides.* The Registrar should have granted unconditional leave to defend. Summons is in form 161 of the C.P.C. which requires application to be supported by affidavit or declaration and this has been complied with. No similar provision to English Order 14 r. 3(c) is found in our Code.

Joaquim for respondent (plaintiff).

Re Krishnasamy (*supra*) is binding on Registrar.

Alternatively Section 213 applies, and matter should go back to Registrar for consideration whether he should order defendant to submit himself for cross-examination.

The English decisions do not apply.

0.14, r.1 requires merely an affidavit containing allegations which constitute a defence. Under this rule, so long as the allegations are there, nothing more is required. But under Section 460 "evidence satisfactory to the Registrar" is required. This does not appear in the English Rules. The Registrar is not asked to decide the truth of the allegations. The issue before the Registrar is whether the affidavit constitutes evidence satisfactory to himself. When the truth of an affidavit is impugned, cross-examination of the deponent thereon is a proper means for arriving at a decision on this issue.

Cussen, J.—This is an appeal from the decision and order of the Registrar made in Civil Suit 100 of 1939.

The plaintiff sued for a sum of money due on a Promissory Note under the Summary Procedure in Chapter XXXIX of the Civil Procedure Code.

The Defendant applied for leave to defend, his application being supported by an affidavit which is the correct procedure. Form 161 in the 2nd schedule to the Code providing the Form of Summons in a Summary Suit states:—

> "Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to appear in the suit".

Plaintiff's Solicitor Mr. Joaquim gave notice to the Defendant to attend for cross—examination on his affidavit. The Defendant did not appear at the hearing before the Registrar of his application for leave to defend. He was represented by counsel (Mr. Teh). Mr. Joaquim appeared for the Plaintiff.

Mr. Joaquim cited *Re Krishnasamy,* (1933-34) F.M.S.L.R. 8; 2 M.L.J. 195.

That was a Petition for a Receiving Order against Krishnasamy.

The debtor opposed the application for a Receiving Order and filed an affidavit in support.

Counsel of the Petitioning Creditor served notice on the debtor's counsel requiring the debtor to attend the Court for cross-examination on his affidavit. The debtor did not attend.

The learned Judge at the hearing of the Petition held:

> "The rule with regard to the attendance of deponents for cross-examination on affidavits, and the consequence of the failure to so attend, is the same in bankruptcy as in ordinary civil proceedings—see **'In re Bottomley, exparte Brougham,** (1915) 84 L.J.K.B. 1020'.
>
> This rule of practice ordains that if a deponent fails to attend and submit himself to cross-examination in response to such a notice his affidavit cannot be read".

The learned Registrar followed that ruling and held that the Defendant's affidavit could not be read.

As there was then nothing before him to support the application for leave to defend the Registrar then on application by Defendant's counsel made an order giving leave to defend on payment into Court of the sum of $5,000.

This order was made under Sect. 460(i) Civil Procedure Code and, since the Defendant's affidavit had not been admitted, was the only order giving leave which it was open to the Registrar to make.

Sect. 460(i) reads:—

> "The Court, shall, upon application by the defendant, give leave to defend the suit, upon the defendant paying into Court the sum mentioned in the summons or upon evidence, satisfactory to the Court, which discloses a defence or such facts as the Court may deem sufficient to support the application, and on such terms as to security, framing and recording issues, or otherwise, as the Court thinks fit".

The Defendant now appeals against the ruling of the Registrar rejecting his affidavit and asks that the Order consequent thereon be set aside and that the matter be remitted back to the Registrar.

In the case of *Re Krishnasamy* the Debtor appealed to the Court of Appeal against the Receiving Order made thereon on the ground, *inter alia*, that the Court was wrong in holding that he should have appeared for cross-examination and in disregarding his affidavit.

The appeal was allowed but as it was by a consent order with costs to the appellant, there is, so far as I can find, nothing on record to show whether the Court of Appeal considered and made any ruling on this point in question.

With great respect to the learned Judge who gave the ruling in *Re Krishnasamy* I find myself unable to agree with it. That ruling is based on the English practice. But in our Code the use of affidavits in proof of facts and the cross-examination of the deponents is regulated by the provisions of Sections 212 and 213 of the Civil Procedure Code which are as follows:—

> "212. Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable.
>
> Provided that, where it appears to the Court that either party **bona fide** desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.
>
> "213. Upon any application evidence may be given by affidavit but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.
>
> Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court or the Court otherwise directs".

This present case falls under the provisions of Sect. 213.

It is quite clear, it seems to me, that the rule of practice in English Law on which the ruling in *Re Krishnasamy* is based cannot apply. To apply it would be to make the provisions of Sect. 213 and the discretion therein given to the Court unnecessary. If a party by giving notice to the other party to attend for cross-examination can require on failure to attend, the forthright rejection of his affidavit, it is obvious that no application would ever be made to the Court to order attendance; and there would be in practice no occasion for the exercise by the Court of the discretion given it in the words "the Court may at the instance of either party, order the attendance for cross-examination of the deponent".

I am of opinion therefore that the decision of the learned Registrar was wrong.

The proper procedure was for the Plaintiff to ask the Registrar to make an order for attendance. The Registrar should then consider and decide whether to make an order or not.

If an order is made and the Defendant does not without reasonable excuse obey it then I consider the Registrar would be acting properly in disregarding the affidavit.

I therefore allow this appeal, the order of the Registrar is set aside and the application for leave to defend is referred to him again to determine in accordance with the ruling in this judgment.

The appeal is allowed with costs.

Appeal allowed.